IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.04.2007

Coram:

The Honourable Mr. Justice V. DHANAPALAN

S.A. No.242 of 1996

O.S. Venkataraman .. Appellant

vs.

R.V.M.K. Prasad .. Respondent

Second Appeal preferred under Section 100 of Civil Procedure Code against the judgment and decree dated 21.07.1994 passed in A.S. No.25 of 1993 on the file of the Sub Court, Poonamallee confirming the judgment and decree dated 20.11.1992 passed in O.S. No.1084 of 1972 on the file of the Additional District Munsif, Poonamallee.

For appellant Mr. T.R. Mani, Senior Counsel
for Mr. C.P. Sivamohan

For respondent Mr. T.R. Rajagopalan, Senior Counsel
for M/s. T.R. Rajaraman &
Pushpa Sathyanarayanan

J U D G M E N T

This Second Appeal is preferred by the unsuccessful plaintiff, calling in question, the legality of the judgment of the Sub-Judge, Poonamallee in A.S. No.25 of 1993 confirming the judgment of the Additional District Munsif in O.S. No.1084 of 1972.

2. The plaintiff initially filed a suit for declaration of title and permanent injunction and subsequently filed an I.A. for amending the prayer seeking recovery of possession of the suit property and got the said I.A. allowed.

3. The case of the plaintiff, in brief, is as under:

He purchased the lands in S. No.295/1 and 295/2 measuring 8 grounds and 60 sq. ft., which is the suit property, from one Kanniammal vide sale deed dated 17.06.1965 and has been in absolute possession and enjoyment of the same. The defendant who is the owner of plot no.4 lying to the north of the suit property, having purchased the same from Kanniammal on 05.03.1965, purchased yet another plot during April 1971 and on that basis, with a view to annexe the suit property to plot no.4 owned by him, attempted during the third week of September 1971, to destroy the fence put up by the plaintiff in the suit property. This was objected to by the plaintiff and a legal

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notice was sent by the plaintiff on 29.09.1971 and an evasive reply notice dated 14.10.1971 was sent by the defendant. Since it is the plaintiff who got the sale deed executed first, he has to be granted (i) relief of declaration of title (ii) interim injunction against the defendant and (iii) relief of recovery of possession of the suit property by removing the superstructure in the suit property.

4. On the contrary, the case of the first defendant, as culled out from the written statement, is as follows:

There is no correlation between the suit property and the property the plaintiff claims to have purchased; he (the defendant) is the owner of two plots measuring 5.02 acres in Survey Nos.295/1 and 295/2, viz., an extent of 16 grounds and 1,731 sq. ft. being plot no.4 purchased on 05.03.1965 from Kanniammal and an extent of 16 cents, purchased on 05.03.1971 from Natesa Chettiar, the second defendant who is none other than Kanniammal's husband, without any encumbrance; he has been in absolute possession and enjoyment of these properties right from the date of sale deed and there is absolutely no pleading in the plaint as to which portion was encroached by the first defendant in the land purchased by the plaintiff from Kanniammal. The first defendant filed his additional written statement contending that the I.A. filed in 1987 to amend the prayer in the plaint is barred by limitation.

5. On the side of the plaintiff, one witness was examined and three exhibits were marked and on the defendant's side, ten exhibits were marked and one witness was examined.

6. The Trial Court, on an examination of the evidence let in on either side, decreed the suit as for the declaration of title is concerned and negatived the relief of recovery of possession on the ground that the prayer for relief of possession was amended after a long span of 12 years and that the Limitation Act bars the claim for possession.

7. The lower appellate court concurred with the finding of the Trial Court with regard to declaration of title and negatived the claim for vacant possession but on a different ground, i.e. not on the ground of limitation but on the ground that the plaintiff has not clearly defined the portion encroached upon by the first defendant.

8. As against the negative findings of the Courts below, though different, in respect of recovery of vacant possession, the present Second Appeal by the plaintiff and this Court, had admitted this Second Appeal on the substantial question of law as to whether the relief for possession is barred by limitation.

9. Mr. T.R. Mani, learned Senior Counsel appearing on the side of the appellant has contended that the respondent has not preferred any appeal against the portion of decree that went against him in respect of declaration of title and thus, the appellant's title has become final and the finding of both the Courts below that the

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appellant is not entitled to recovery of possession is not proper in view of the settled principle that possession follows title. He has further argued that since the respondent has not preferred any appeal against both the orders of amendment of the plaint schedule, on application of the doctrine of Relation Back, the plaint schedule as amended must be deemed to be effective from the date of the plaint itself and not from the respective dates of amendment in the absence of any order to that effect and therefore, the absence of mentioning of the extent of encroachment or trespass would not matter particularly, when the declaration of title is in favour of the appellant.

10. Attacking the reasoning of the Trial Court that the appellant is not entitled to recovery of possession since the prayer for such a relief was amended after a period of twelve years which is barred by law of limitation, the learned Senior Counsel for the appellant has argued that the said finding of the Trial Court cannot be sustained in view of the new Limitation Act under which it is only for the respondent to plead and prove adverse possession and it is not at all for the appellant to prove his title and possession within 12 years preceding the date of plaint and particularly and admittedly, when the respondent has not chosen to plead adverse possession in his written statement despite having been directed by this Court to do so in the Revision Petition filed by him, the judgment of the Trial Court in denying relief of recovery of possession due to law of limitation which is not accepted by the lower appellate court as well, is not acceptable.

11. In countering the finding of the appellate court in denying the relief of recovery of possession to the appellant on the ground that the appellant had not defined the exact extent or area encroached upon by the respondent, the learned Senior Counsel appearing for the appellant has strenuously contended that since the declaration of title granted by the Trial Court has not been challenged in the Appeal Suit by the respondent and by virtue of the provisions contained in the new Limitation Act, the appellant need not prove possession within 12 years preceding the date of plaint, irrespective of the area or extent of encroachment of land and that too, in the absence of any plea of adverse possession by the respondent.

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12. The learned Senior Counsel for the appellant, in support of his arguments has relied on:

a. A judgment of the High Court of Madras reported in AIR 1976 MADRAS 124 in the case of Bhagavathy Pillai & another vs. Savarimuthu and another:

> "Articles 142 and 144 gave rise to a good deal of confusion with respect to suits for possession by owners of property. The law as it stood appeared to favour a trespasser as against an owner, because the decision had held that in an ejectment action by the owner of the property, it was not sufficient for him to establish his

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title, but he had also to go further and establish that he was in possession of the property within 12 years before the date of the institution of the suit. In order to redress this anomaly, Articles 64 and 65 were suitably altered. Article 64 deals with suits based on possession and not on title. In such a case the plaintiff, who while in possession had been dispossessed, could file a suit within a period of 12 years from the date of dispossession. For the purpose of Article 64, there is no question of proving any title. Article 65 relates to suits for possession based on title. In such a case, the period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Article 65, the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for a period of 12 years, which has the effect of extinguishing the title of the owner by the operation of Section 27 of the present Act. If he fails to do so, then, the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years."

b. yet another judgment of this court reported in AIR 1972 Madras 162 (V 59 C 52) in the case of The Southern India Education Trust, Madras vs. M.S. Jagadambal (paragraphs 10 & 13)

In AIR 1968 SC 1165, Their Lordships of the Supreme Court while considering the relative scope of Sections 8 and 9 of the Specific Relief Act, had observed:

> "The uniform view of the courts is that if Section 9 of the Specific Relief Act is utilised, the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of six months has passed questions of title can be raised by the defendant and if he does so, the plaintiff must establish a better title of fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended Articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based

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> on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law."

Relying on the above observation that the law as laid down by Article 64 and 65 of new Act is only declaratory and not remedial, Alagiriswami J., has expressed that Articles 64 and 65 should be deemed to have been the law even before the commencement of the new Act and that where when a person who has got title sues for possession is entitled to succeed even without showing possession within 12 years of suit, unless defendants are able to establish that they have perfected title by adverse possession, and that Article 142 of the old Act cannot be applied after the new Act came into force, even in respect of suits filed earlier. With respect, we are not able to accept the view of Alagiriswami, J. The decision of the Supreme Court above referred to does not, in our view, touch this aspect, and its observations that Article 64 and 65 of the new Act are declaratory of the existing law cannot be construed so as to take away the effect and operation of Article 142 of the old Act. In fact, we find that Their Lordships of the Supreme Court have accepted as correct the following dictum laid down in Perry v. Clissold, 1907 AC 73:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the original owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished and the possessory owner acquires an absolute title."

In our view, the said decision of the Supreme Court does not support the view taken by Alagiriswami, J. that even in respect of suits filed before the new Act came into force, it is

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not incumbent upon the plaintiff to prove possession within 12 years of suit if he establishes title to the property."

c. a decision of the Allahabad High Court reported in AIR 1978 Allahabad 555 in the matter of Smt. Bitola Kuer vs. Sri Ram Charan and others (para 9)

"Coming to the question of limitation, it must be observed that the suit giving rise to this second appeal was instituted after coming into force of the Limitation Act, 1963. The trial court was clearly wrong in basing its finding on the question of limitation on considerations based on Art. 142 of the Limitation Act, 1908. the suit was on the basis of title and was governed by Art. 65 of the Limitation Act, 1963. The plaintiff could not be non-suited if she failed to prove her possession over the property in dispute within 12 years of the date of the institution of the suit. According to the finding recorded by the two courts below, the plaintiff had succeeded in proving her title. She could be denied the relief of possession only if the defendant succeeded in showing that he was in adverse possession of the property in dispute for more than 12 years. The two courts below have not taken into account the relevant consideration which ought to have been taken into account in arriving at the conclusion that the plaintiff's suit was barred by limitation.

d. a judgment of the Orissa High Court reported in AIR 1990 Orissa 124 in the matter of Jagamohan Garnaik & others vs. Sankar Samal and others (para 4)

"The aforesaid position of law as is apparent from an interpretation of Arts.64 and 65 of the Limitation Act cannot be said to be affected in any manner in view of Section 3 or Section 27 of the Limitation Act. Section 3 of the Limitation Act says that a suit filed after the prescribed period shall be dismissed even though limitation has not been set up as defence. In other words, a court can dismiss a suit on the ground of limitation even if the defence has not raised that plea, where on the face of the pleadings, the Court comes to the conclusion that the suit is barred by limitation. Section 27 lays down an exception to the general principle that limitation bars only the remedy and does not extinguish the right and such exception is insofar as sits for possession of properties are concerned. But neither Section 3 nor Section 27

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has anything to do with the onus of proof or burden of proof. We fail to understand how Section 3 or Section 27 changes the legal position arising out of Arts.64 and 65 of the Limitation Act. Even Mr. Misra, the learned counsel appearing for the defendants-appellants, does not press the decision of Hon'ble S.C. Mohapatra, J. into service and fairly states that the said decision is unsupportable in law. In view of the clear position emerging out of the provisions of Arts. 64 and 65 of the Limitation Act, we would answer the question posed before us by holding that when a plaintiff files a suit for declaration of title and possession basing his claim on his title and admits dispossession, then he is not to be required to prove that his dispossession was within twelve years of the filing of the suit and he can succeed on establishing his title and will fail only when the defendant proves that he has perfected his title by way of adverse possession and Section 3 or Section 27 of the Limitation Act does not change the aforesaid legal position in any manner. In our opinion, the decision in Second Appeal No.312 of 1980 (reported in 1988 (1) Orissa LR 176) (Khetrabasi Patra v. Guru Charan Patra) decided on 08.01.1988 by Hon'ble S.C. Mohapatra, J. has not at all been correctly decided and the law laid down therein is accordingly overruled."

e. A Supreme Court decision reported in AIR 2001 SC 2896 in the matter of Siddalingamma & another vs. Mamtha Shenoy (para 10)

". . . An application for amendment under Order 6, Rule 17 of the PC was moved and the deficiency in the pleadings stood removed by the amendment permitted by the trial Court in exercise of its discretionary jurisdiction to do so. The order permitting the amendment was not put in issue promptly. Even the High Court in its impugned order has not found fault with the order of the trial Court permitting the amendment nor has it expressed an opinion that leave granted by the trial Court for amendment in the eviction petition suffered from any error of jurisdiction or discretion. On the doctrine of relation back, which generally governs amendment of pleadings unless for reasons the Court excludes the applicability of the doctrine in a given case, the petition for eviction as amended would be deemed to have been filed originally as such and the evidence shall have to be appreciated in the light of the averments made in the amended petition. The High Court though set aside the order of the trial Court but it is writ large from the framing

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of the order of the High Court, especially the portions which we have extracted from the order of the High Court and reproduced in earlier part of this judgment, that the learned Single Judge of the High court also was not seriously doubting the genuineness of the landlady's requirement on the material available on record but was not feeling happy with the contents of the eviction petition as originally filed an over-zealous attempt on the part of the landlady in projecting her sister's sons and grand-children as her own. . ."

f. yet another judgment of the Supreme Court reported in AIR 2002 SC 3369 in the matter of Sampath Kumar v. Ayyakannu & another (para 10)

"An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed."

g. one more judgment of the Supreme Court reported in AIR 2004 SC 4261 in the matter of Ramaiah vs. N. Narayana Reddy (dead) by L.Rs. (para 9, 10 & 11)

"We do not find any merit in the aforestated arguments. Article 64 of the Limitation Act, 1963, (Article 142 of the Limitation Act, 1908) is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article, it must be shown that the suit is in terms as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by discontinuance. Article 65 of the Limitation Act, 1963 (Article 144 of the Limitation Act, 1908) on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on plaintiffs' title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65. The question whether the article of limitation applicable to a particular suit is article 64 or 65 has to be decided by reference to pleadings. The plaintiff cannot invoke article 65 by suppressing material facts. In the present case, in suit No.357/60 instituted

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by N. Narayana Reddy in the Court of Principal Munsiff, Bangalore, evidence of the appellant herein was recorded. In that suit, as stated above, the appellant was the defendant. In his evidence, appellant had admitted that he was in possession of the suit property upto 1971. This admission of the appellant in that suit indicates ouster from possession of the appellant herein. In the present suit instituted by the appellant, he has glossed over this fact. In the circumstances, both the Courts below were right in coming to the conclusion that the present suit was barred by limitation. The appellant was ousted in 1971. The appellant had instituted the present suit only on 08.05.1984. Consequently, the suit has been rightly dismissed by both the Courts below as barred by limitation.

h. a judgment of this Court reported in 2006 (1) CTC 526 in the matter of D.V. Athisayaraj vs. Tirunelveli Diocese Trust Association, No.5, Punithavathiyar Street, Palayamkottai, Tirunelveli (para 29)

"In Sampath Kumar v. Ayyakannu and another, 2002 (4) CTC 189, the Supreme Court has held, reiterating the view already taken by the Apex Court:

"An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases, the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed"

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13. Per contra, the two-fold contention of Mr. T.R. Rajagopalan, learned Senior Counsel appearing on the side of the respondent, is that the appellant has not at all clearly set out the portion which he seeks to recover from the respondent and secondly, whether the case of trespass into the property pleaded by the plaintiff after the suit, i.e. in May 1987, is true. According to the learned Senior Counsel for the respondent, seeking relief of recovery of possession, the appellant had sought amendment of the plaint prayer only and no amendment was made in respect of the alleged encroachment in the main pleading. Thus, it is his argument that the series of amendments made by the appellant, i.e. the first amendment in respect of plaint schedule, the second amendment in respect of plaint prayer and the third amendment with regard to

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schedule of property, would only bring to light the fact that the appellant himself was not sure of the property he was seeking to recover.

14. It is the strenuous contention of the learned Senior Counsel for the respondent that had the trespass been true, the appellant could have very well specified the date of trespass and the extent encroached by the respondent and in the absence of any such information in the plaint and in view of the settled proposition of law that no amount of evidence could be looked into by the Courts in the absence of necessary pleadings, the Trial Court is correct in negativing the claim of the respondent in respect of recovery of possession which is also confirmed by the lower appellate court. Regarding the non-filing of the written statement by the defendant, it is the argument of the learned Senior Counsel for the respondent that since no specific pleadings were made in the plaint with regard to relief of recovery of possession, the necessity to file a written statement did not arise and the contention of the learned Senior counsel for the appellant cannot be sustained. The learned Senior Counsel for the respondent has relied on paragraphs 11 and 12 of the appellate court judgment to substantiate his stand that the plaintiff had not clearly specified the area encroached by the defendant and it is also his submission that P.W.1, i.e. the appellant himself has not spoken in clear terms with regard to the encroachment by the defendant, removal of name board, fence and shed by him. It is his further argument that even according to the appellant if the defendant had encroached his property, he could have reacted immediately by way of giving a police complaint and when even that is not the case here, the trespass alleged to be made by the defendant cannot be true.

15 Heard Mr. T.R. Mani, learned Senior Counsel appearing on the side of the appellant and Mr. T.R. Rajagopalan, learned Senior Counsel appearing on the side of the respondent.

16. This Second Appeal has been admitted on the substantial question of law as to whether the relief for possession is barred by limitation. But, the question of law suggested by the appellant in this appeal include the following:

> a. having granted the relief of declaration of title to the suit property to the plaintiff, whether the courts below are justified in rejecting the relief for possession when the measurement of southern boundary of plot no.4 and the measurement of northern boundary of plot no.5 are the one and the same as admitted by D-1 and tally with Ex.A.1 and Ex.B.2 ignoring well accepted principle possession follows title?
>
> b. whether the lower appellate court misdirected itself while giving a finding that the defendant has purchased the entire 5 acres 2 cents; while as per the pleading, he had purchased only 16 grounds, 1721 sq. ft under Ex.B.2 and 16 cents under Ex.B.4 and erred in rejecting the relief for possession?

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17. When the matter was taken up for hearing, it was heard at length and the learned Single Judge, considering that the appellant claims title on the strength of Ex.A.1 and Ex.B.5 dated 17.06.1965 and the respondent claims title under Ex.B.7 dated 05.03.1965 and Ex.B.4 dated 05.03.1971 respectively and therefore, there is a dispute in regard to the identity of the suit property as well as measurements and since the boundaries are not clear, the parties have not even submitted any sketch showing their respective properties along with their pleadings before the Courts below nor made any request for appointment of an Advocate Commissioner, felt it necessary to appoint an Advocate Commissioner to take measurements and to identify the lands covered under Ex.B.4. Accordingly, this Court appointed an Advocate Commissioner to submit his report and sketch on or before 22.06.2006. Pending this, the respondent has preferred Civil Appeal No.5346 of 2006 against the appointment of Advocate Commissioner and this Civil Appeal has been finally disposed of by the Supreme Court on 28.11.2006. The order in Civil Appeal reads as follows:

> "The short question which arises for our consideration is as to whether the High Court was justified in doing so. In our opinion, it was not. Although we are not aware as to what substantial question of law, if any, was formulated, evidently, the question which would fall for consideration before the High Court would be as to whether a prayer for recovery of possession having been made upon obtaining leave of the Court to amend the petition, the suit of the plaintiff-respondent could have been dismissed. The consequential question which evidently would arise for consideration would be the applicability of Article 65 of the Limitation Act, 1963, on the facts found by the Court below on appreciation of evidence, would be attracted in the instant case.
>
> Therefore, in our opinion, the learned Single Judge of the High Court should have determined the said question first, but without doing so, an Advocate Commissioner was appointed. We re therefore of the opinion that the impugned judgment cannot be sustained which is set aside accordingly and the matter if remitted back to the High Court for consideration thereof afresh on merit. If it is found that no question of law has been formulated, it may do so and hear the parties thereupon. The appeal is allowed."

18. After that, this appeal has been listed before me for final hearing and the appeal has been taken for consideration. Though at the stage of admission, there was only one substantial question of law formulated as stated earlier, in the facts and circumstances of the case, there is one important question i.e. whether a prayer for recovery of possession having been made, upon obtaining leave of the

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Court to amend the petition, the suit of the plaintiff-respondent could have been dismissed.

19. Admittedly, a suit for declaration of title was filed by the appellant in the year 1972 and thereafter, an application for amendment of the plaint was filed in the year 1987 seeking inter alia for a consequential relief of recovery of possession of the suit land and that amendment was allowed. Both the Trial Court as well as the lower appellate court has granted decree for declaration of title but refused to grant a decree for recovery of possession on different grounds. It is seen that though the plaintiff claims to be in possession of the property, no evidence has been let in before the Courts below and at the time of filing of the suit, no document has been filed along with the plaint to prove his possession of the suit property. It is further seen that during 1987, an application has been filed seeking relief of possession in I.A. No.2226 of 1987 and the same was allowed on 04.03.1992. As against that order, the first defendant / respondent filed CRP No.1035 of 1992 before this Court challenging the amendment order passed on 04.03.1992. This Court, while upholding the amendment, held that it was for the first defendant to raise the plea of limitation or adverse possession by way of additional written statement. Earlier, the appellant also filed IA No.755 of 1973 to amend the plaint schedule to incorporate the words and figures "8 grounds and 60 sq. ft" preceding the words and figures "5 acres and 2 cents" and the same was allowed and the amendment was carried out on 29.09.1973 and there was no challenge to the amendment order. It also appears that the suit was decreed ex parte on 12.06.1978 as prayed for, in respect of declaration. The first defendant has got the ex parte decree set aside on 10.08.1987 after a lapse of over nine years. During this period, the order of injunction and the decree for injunction were in force from June 1973 to August 1987. After the amendment for recovery of possession claiming that there was a trespass into the property and encroachment was made, finally, trial commenced on 06.04.1992. The plaintiff was examined as P.W.1. During the course of his cross-examination, he has submitted that he filed another petition for amending the plaint schedule for substituting the schedule of property to be in accordance with the head in Ex.A.1 and Ex.B.5 dated 17.06.1965. That amendment also was allowed by an order dated 18.09.1992 and it was duly carried out. Finally, the suit came to be decreed insofar as relief of declaration of title and the relief of possession was negatived on the ground that the same was claimed after 12 years and that the law of limitation bars the claim for possession and not on plea of proof of adverse possession. The appellant preferred an appeal against the portion of the decree refusing the relief of recovery of possession. There was no appeal or cross appeal against the portion of decree insofar as the relief of declaration of title by the first defendant / respondent. Therefore, the decree declaring title of property became final and the lower appellate court also confirmed the decree of declaration of title but negatived the relief of possession not on the ground of limitation but on the ground that the plaintiff has not clearly defined the portion encroached upon by the first defendant.

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20. Originally, the suit was decreed ex parte on 12.06.1978 as prayed for and that ex parte decree was set aside on 10.08.1987 after a lapse of over nine years. It is the case of the appellant/plaintiff that there was encroachment; but it is not stated on what date, the defendant had encroached. In other words, no oral or documentary evidence has been let in to prove the date on which encroachment was made. Even in the amended plaint, the cause of action for the suit has been mentioned as 14.10.1977 and that the defendant was in possession of the suit property. Prior to the period of this suit, the period of limitation has already been over. It was also brought to the notice of this Court proper meaning of Article 65 of the Limitation Act. On the facts and circumstances of the case in question and nature of the case as the Limitation Act, Article 65 is time barred and therefore, the Courts below held that the plaintiff is not entitled to get relief of recovery of possession and decided the issue in favour of the first defendant, the respondent herein.

21. It is seen from the oral and documentary evidence that one Kanniammal sold plot no.4 and thereafter, plot no.5 was properly measured and sale deed was executed in favour of the plaintiff. Thereafter, Ex.A.1=B.5, sale deed was made and there was no necessity to measure the suit property as it was already measured. The sketch annexed to the sale deed Ex.B.1 is different from Ex.B.7. According to the first defendant, in Ex.B.7, the extent of property is shown as 16 grounds 1721 sq. ft. and only after that, plot no.5 was purchased and it is also seen from the sketch. Therefore, plot no.5 as per sketch in Ex.B.7 is found correct. Both the parties have not raised any query with regard to the boundaries and measurements of the property in the sale deed. It is also admitted that after the sale, it was left with the said Kanniammal and property measuring 8 grounds and 60 sq. ft. was purchased by the plaintiff under Ex.A.1.

22. The case of the plaintiff is that he had purchased the suit property and when the same was in his possession and he had also put up fencing and name board, the first defendant had encroached his property with a view to annexe the same with his property. The further case of the plaintiff is that on his refusal to sell the suit property to the first defendant, the first defendant, in collusion with Kanniammal's husband and one Thomas, falsely created Ex.B.4 and also destroyed one side of the fencing and hence Ex.B.1, legal notice was sent by the plaintiff to the first defendant. The plaintiff, during the course of his deposition, has admitted that the first defendant had purchased plot no.4 at the northern side of the suit property and that the suit property in plot no.5 is in the southern portion. According to the plaintiff, since the first defendant attempted to encroach the suit property, the suit was filed seeking temporary injunction and even after grant of temporary injunction, the first defendant had encroached the suit property and hence, an amendment to the plaint was sought seeking relief of recovery of possession. An important point to be decided in this case is that whether the plaintiff took possession of the suit property as per Ex.A.1. From the documentary evidence filed and the oral evidence adduced, it can be found that from the period of sale of plots 1,2

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and 3, the plaintiff was seized of the suit property. Further, from the oral evidence of the plaintiff that he, Kanniammal and Thomas had measured the suit property, it can be easily concluded that the plaintiff had known the exact measurement of the suit property. From Ex.A.1, it can be seen that the plaintiff was given possession. This is also corroborated by the evidence of the first defendant who admits that plot no.5 was vacant. However, by deposing that he had not filed either patta or kist receipt and that the same were given to his counsel who had lost them, the plaintiff had miserably failed to amply prove that he was in possession of the suit property. That apart, except the mere oral deposition that he had put up fencing and erected name board and had also given paper advertisement, there is no documentary evidence to that effect and further, no adangal extract has been filed in this regard. Though the plaintiff claims that the first defendant had encroached his property despite the order of temporary injunction, there is no evidence to this effect.

23. On the other hand, the case of the first defendant is that the plaintiff had never been in possession of the suit property, the plaintiff had obtained temporary injunction based on the sale deed and legal notice and the plaintiff had not let in any evidence to substantiate that he was in possession of the suit property. The further case of the first defendant is that based on Exs.B.7 and B.4, he has been in possession of the suit property and other properties and has also built a factory and let it for rent. This is substantiated by Exs.B.9 and 10, patta and kist receipt respectively. Though it is contended by the plaintiff that the first defendant had encroached the property, the exact date of encroachment as also the area of encroachment has not been pleaded in the application filed seeking recovery of possession nor was any document filed to that effect. Further, as the period of limitation had expired as per Article 65 of the Limitation Act, the plaintiff is not entitled to get recovery of possession.

24. The lower appellate court while endorsing the above finding of the Trial Court has also elaborately discussed that the plaintiff had deposed that he was not aware as to whether there was any demarcation stone for plot no.4. It is also the clear finding of the lower appellate court that the plaintiff had not given any police complaint in connection with the alleged encroachment by the first defendant. It is further observed by the lower appellate court that the plaintiff was not aware as to whether there was any compound wall between the third and fourth plots. Giving due consideration to all these aspects, the lower appellate court has held that the Trial Court is justified in denying the relief of recovery of possession to the plaintiff though he is entitled to relief of declaration of title.

25. Admittedly, both the courts below have concurrently held that there was no claim for possession even at the time of filing of the suit and there was no pleading made in the plaint to that effect. Further, the suit for declaration was decreed ex parte on 12.06.1978 as prayed for and that ex parte decree was set aside on 10.08.1987, after a lapse of over nine years. By that time also, there was no claim by the plaintiff for recovery of possession in respect of the

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suit property. It is only after the ex parte decree was set aside, an I.A. was filed by the plaintiff seeking recovery of possession and the same was allowed on 04.03.1992 and this was also confirmed by this Court in a revision petition. From this, it is clear that the plaintiff had no proper idea about his possession at the time of filing of the suit and only after the ex parte decree was set aside after a lapse of nine years, he had claimed that there was encroachment and accordingly, sought the relief of recovery of possession. In order to prove whether there was any such encroachment, the plaintiff has not made any specific plea of the exact date of encroachment and to what extent the first defendant had encroached and he has not let in any evidence in support of his claim even after the amendment of prayer for relief of recovery of possession. If the possession by the plaintiff is proved, then the plaintiff's claim for the recovery of possession within the period of limitation is the consequential question to be decided.

26. As per Article 65 of the Limitation Act, it is a party who claims adverse possession is to plead and prove adverse possession and it is not for the other party to prove his title and possession within 12 years preceding the date of plaint. In this case, it is otherwise in the sense that, the appellant contended that since the declaration of title granted by the Trial Court has not been challenged in the appeal suit by the respondent and by virtue of provisions contained in the new Limitation Act, he need not prove possession within 12 years preceding the date of plaint, irrespective of the area of encroachment of the land and that too in the absence of any plea of adverse possession by the first defendant and this contention of the plaintiff cannot be sustained as the period of limitation had expired as per Article 65 of the Limitation Act unless the doctrine of relation back is applied to this case.

27. Article 64 deals with suits based on possession and not on title. In such a case, the plaintiff, who while in possession had been dispossessed, could file a suit within a period of 12 years from the date of dispossession. For the purpose of Article 64, there is no question of proving any title. Article 65 relates to suits for possession based on title. In such a case, the period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Article 65, the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for a period of 12 years.

28. In the instant case, the suit was originally filed for declaration of title only and not for possession. Only in a case where possession has been dispossessed, a suit has to be filed within 12 years from the date of dispossession. Therefore, in the absence of any such dispossession, at the time of filing of the suit, if there is a claim for recovery of possession, that can be made only from the date of the cause of action for the alleged trespass. If the cause of action for recovery of possession is to be from the date of filing of the plaint, the date of trespass claimed by the plaintiff is to be counted to decide the aspect of limitation with regard to adverse possession. In the peculiar circumstances of this case, the suit was filed in 1972 and it was decreed ex parte in 1978

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and thereafter, the ex parte decree was set aside in 1987. By that time, the plaintiff has alleged trespass by the first defendant. Therefore, in the absence of any supporting evidence on the side of the plaintiff to prove his allegation, whether the period of limitation can be counted from the date of the plaint is a point to be determined.

29. One more contention raised on the side of the appellant is that the respondent neither preferred appeal nor revision against both the orders of the amendment to the plaint schedule, one in the year 1973 and another in the year 1992 and therefore, by applying the doctrine of relation back, the plaint schedule as amended must be deemed to be effective from the date of the plaint itself and not from the respective dates of amendment in the absence of any order to that effect; therefore, the extent of encroachment or trespass would not matter in view of the declaration of title in favour of the plaintiff having become final and in the absence of any plea of adverse possession being raised or any issue framed or any finding in that respect.

30. This plea has been assailed by the first defendant on the ground that the amendments relate only to the schedule of property and the prayer seeking relief of recovery of possession and there is no specific pleading in the plant by virtue of the amendment and in such circumstances, it does not warrant an additional written statement to be filed. Of course, it is settled principle that no amount of evidence could be looked into by courts in the absence of necessary pleadings. Undisputedly, it is only the appellant who specifically asked for recovery of possession of the suit property based on trespass or encroachment by the first defendant, subsequent to the suit. The plaintiff/appellant ought to have pleaded and proved the specific date and extent of trespass by the first defendant and having failed to do so, he is estopped from claiming the relief of recovery of possession.

31. It is also seen from the evidence of P.W.1 that it is the admitted case that the respondent was in possession of the suit property prior to the suit. Therefore, the findings of the Trial court as well as the appellate court are that the first defendant was in possession of the property even prior to the suit and therefore, there is no question of any encroachment and P.W.1 has not spoken anything about the trespass by the first defendant by way of removing the name board, fence and shed. As rightly observed by the lower appellate court, it is also to be seen that normally a person would have reacted by giving a police complaint about the trespass and even this does not appear to have been done by the plaintiff. In the absence of any such efforts on the side of the plaintiff, the concurrent findings of the Courts below that there is no proof of any encroachment by the first defendant either before or after the suit as contended by the plaintiff, and as such, he is not entitled to the relief of recovery of possession, is, in effect, found to be proper and hence, do not, in any way, warrant interference by this Court.

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32. The decision relied on by the counsel for the appellant in AIR 1976 Madras 124, AIR 1972 Madras 162, AIR 1978 Allahabad 555 and AIR 1990 Orissa 124 are all on the question of limitation. In the peculiar circumstances of the case, the question is whether the claim made by the appellant can be counted from the date of the plaint or from the date of trespass. The facts and circumstances in the cases cited by the counsel for the appellant are not akin to the facts and circumstances in the case on hand in the sense that the above rulings only go to show what is the legal proposition. In respect of the judgment reported in AIR 2001 SC 2896, it is on the question of eviction and the amendment in the eviction petition and in that angle, it is also not applicable to the facts and circumstances of the case.

33. The judgments reported in AIR 2001 SC 2896, AIR 2002 SC 3369 and 2006 (1) CTC 526 (supra) are on the point of doctrine of relation back wherein it is uniformly held that an amendment once incorporated relates back to the date of the suit. Of course, these decisions are very much applicable to the case on hand and even when the amendment dates back to the filing of the suit, that cannot be of any help to the appellant for the reason that he has not pleaded and proved his claim that there was encroachment by the first defendant. At least, he could have specified certain information in the plaint such as date of encroachment and area encroached and the area which he seeks to recover but he has not. Thus, though the doctrine of relation back is applicable to the case, when there is no evidence let in by the plaintiff with regard to encroachment claimed to have been made by the first defendant, the relief sought by the plaintiff cannot be granted and the courts below have concluded in the same line. Therefore, the strong contention made by the learned Senior Counsel for the appellant that the recovery of possession should follow consequent to declaration of title does not have legs to stand. Similarly, the consequential relief of adverse possession computing statutory period of limitation also, in principle, if it is applied, again, in the absence of any evidence let in on the side of the plaintiff, the limitation prescribed under Article 65 of the Limitation Act can be applied and even if it is not time-barred, the relief cannot be granted in the absence of any proof of alleged encroachment. In that view also, the conclusion arrived at by the Courts below is found to be perfectly in order and the substantial questions of law are answered accordingly.

Thus, having regard to the facts and circumstances of the case and in view of the discussion made above and the rulings considered, I am of the firm view that there is no legal infirmity in the conclusion arrived at by the Courts below that the appellant/plaintiff, though entitled to the relief of declaration of title to the suit property, is not entitled to the relief of recovery of possession of the suit property. Accordingly, this Second Appeal

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which is devoid of any merit, is dismissed without any order as to costs.

cad

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Poonamallee

2. The Additional District Munsif, Poonamallee

+ 2 ccs to Mr. C. P. Sivamohan, Advocate SR No. 26617

+ 1 cc to Mr. T. R. Rajaraman, Advocate SR No. 27119

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